

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF VENTURA
VENTURA DIVISION**

TENTATIVE RULINGS

EVENT DATE: 08/14/2018
JUDICIAL OFFICER: Kevin DeNoce

EVENT TIME: 08:20:00 AM

DEPT.: 43

CASE NUM: 56-2017-00504137-CU-OE-VTA
CASE TITLE: MACDONALD VS. EXCLUSIVE MERCHANT SERVICES LLC

CASE CATEGORY: Civil - Unlimited

CASE TYPE: Other employment

EVENT TYPE: Motion to Strike - Cross-Complaint
CAUSAL DOCUMENT/DATE FILED: Motion to Strike, 07/17/2018

This case has been assigned to Judge DeNoce for all purposes. The morning calendar before Judge Kevin G. DeNoce will begin at 9 a.m. in courtroom 43. Cases including *ex parte* matters will not be called prior to 9 a.m. Please check in with the courtroom clerk by no later than 8:45 a.m. If appearing by Court Call, please call in between 8:35 and 8:45 a.m.

If you wish to submit on the court's tentative decision, please send an email to the court at: Courtroom43@ventura.courts.ca.gov stating that you submit on the tentative, and copy all counsel/parties on your email. Do not call in lieu of sending an email. If you submit on the tentative without appearing and the opposing party appears, the hearing will be conducted in your absence.

Absent waiver of notice and in the event an order is not signed at the hearing, the prevailing party shall prepare a proposed order and comply with CRC 3.1312 subdivisions (a), (b), (d) and (e). The signed order shall be served on all parties and a proof of service filed with the court. A "notice of ruling" in lieu of this procedure is not authorized.

For general information regarding Judge DeNoce and his courtroom rules and procedures, please visit: <http://www.denoce.com>

Brian G. MacDonald and Gayle Balistreri's motion to strike cross-complaint, (Anti-SLAPP motion).

The court's tentative ruling is as follows:

The court intends to deny Brian G. MacDonald and Gayle Balistreri's motion to strike the cross-complaint, (anti-SLAPP motion). Cross-defendants have not made a threshold showing that the challenged causes of action arise from protected activity. A compulsory cross-complaint related to the claims asserted in the complaint is "rarely, if ever," subject to an anti-SLAPP motion. (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 651, 49 Cal. Rptr. 2d 620, disapproved on other grounds in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5.) A cause of action does not 'arise from' protected activity simply because it is filed after protected activity took place. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76-77.) Nor does the fact '[t]hat a cause of action arguably may have been triggered by protected activity' necessarily entail that it arises from such activity. (*Id.* at p. 78.) The [courts] must instead focus on the substance of [respondents'] lawsuit in analyzing the first prong of a special motion to strike. (*Scott v. Metabolife Internat., Inc.* (2004) 115 Cal.App.4th 404, 413-414; see *City of Cotati v. Cashman, supra*, 29 Cal.4th at p. 78.) "If a cross-defendant believes that a cross-complaint has been filed 'for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation,' or that the claims against it are frivolous or lacking in evidentiary support, then it may move for sanctions, including attorney fees and other expenses, to be awarded in the trial court's discretion. (See § 128.7, subds. (b)-(d).) The anti-SLAPP statute, however, is not the appropriate remedy." (*Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 934,

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116 Cal. Rptr. 2d 187, quoted in *City of Cotati v. Cashman*, supra, 29 Cal.4th at p. 78, fn. 4.)

Anti-Slapp Analysis:

Code of Civil Procedure section 425.16 authorizes early dismissal of meritless claims "arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue." Ruling on a special motion to strike involves a two-prong inquiry and a shifting burden. The initial burden is on the moving defendant to demonstrate that the plaintiff's cause of action against the defendant falls within the ambit of Code of Civil Procedure §425.16. The defendant's acts are protected activity within the meaning of the anti-SLAPP statute if they fall within one of Code Civ. Proc. § 425.16(e)'s four categories: (1) oral or written statements made "before" a legislative, executive, judicial, or other official proceeding; (2) oral or written statements made "in connection with" an issue under consideration by a legislative, executive, or judicial body, or "any other official proceeding authorized by law"; (3) oral or written statements made in a place open to the public or in a public forum in connection with an issue of public interest; or (4) "any other conduct in furtherance of the exercise of the constitutional rights of petition or free speech in connection with a public issue or an issue of public interest." The defendant has the threshold burden of showing that the challenged causes of action "arise from" acts in furtherance of his or her constitutional speech or petitioning rights in connection with a public issue. (Code Civ. Proc. § 425.16(b)(1); *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056.)

If the moving defendant satisfies the initial burden, the burden shifts to the plaintiff to demonstrate a probability of prevailing on its claims. (See *Ramona Unified School Distr. v. Tsiknas* (2005) 135 Cal.App.4th 510, 518-519.) The focus of this issue is not the form of the cause of action, but the defendant's actions giving rise to the alleged liability. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76-78.) The critical consideration is whether the cause of action is based on the defendant's protected speech or petitioning activity. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88-89.) In order to demonstrate a probability of prevailing, the plaintiff must demonstrate both (i) that the cause of action states a claim (i.e., a pleading test); and (ii) is supported by *prima facie* evidence which, if uncontroverted, is sufficient to support a judgment on the cause of action in the plaintiff's favor. (See *Premier Medical Management Systems, Inc. v. Calif. Ins. Guarantee Corp.* (2006) 136 Cal.App.4th 464, 476.) "It is well settled that in opposing a SLAPP motion the plaintiff's showing of a probability of prevailing on its claim must be based on admissible evidence." (*Fashion 21 v. Coalition for Humane Immigrant Rights of Los Angeles* (2004) 117 Cal.App.4th 1138, 1147; see also *Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1236 [noting that the showing must be made through "competent and admissible evidence"].) Plaintiff cannot merely rely on allegations in the complaint, even if verified, to meet this evidentiary test under prong two but instead must adduce competent, admissible evidence. (*Roberts v. Los Angeles County Bar Assn.* (2003) 105 Cal.App.4th 604, 613-614; see also *Paiva v. Nichols* (2008) 168 Cal.App.4th 1007, 1017 [same].)

Application of Anti-Slapp Analysis to the Facts of this Case:

In the current matter, XDs are challenging all 5 causes of action in the cross-complaint (1) misappropriation of trade secrets; 2) fraud by concealment; 3) intentional interference with contractual relations; 4) breach of contract; and 5) violation of Penal Code §496). Cross-defendants ("XDs") claim that Exclusive Merchant Services, LLC's ("EMS") cross-claims arise from a protected activity. They allege that they have been brought because P filed claims with the EDD for unemployment benefits and with the court for Labor Code violations. See *Cross-Complaint p.2:3-4* and Anderson Dep. p.141:15-23 & p.154:13-25. As such, Cross-defendants argue that the first prong of the anti-SLAPP test has been met.

XDs argue that but for MacDonald's filing of claims with the EDD and this court, EMS would not have filed its cross-complaint. XDs point to the cross-complaint itself where it states "EMS brings this cross-action in response to MacDonald's attempt to leverage meritless claims in an effort to avoid prosecution for his wrongful acts." XC p.2:3-4. However, the fact that a cross-complainant would not have brought a cross-complaint but for the cross-defendant's initiation of a lawsuit, is not a sufficient basis to support an Anti-SLAPP challenge. A cause of action does not 'arise from' protected activity simply because it is filed after protected activity took place. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76-77.) Nor does the fact '[t]hat a cause of action arguably may have been triggered by protected activity'

necessarily entail that it arises from such activity. (*Id.* at p. 78.) The [courts] must instead focus on the substance of [respondents'] lawsuit in analyzing the first prong of a special motion to strike. (*Scott v. Metabolife Internat., Inc.* (2004) 115 Cal.App.4th 404, 413-414; see *City of Cotati v. Cashman, supra*, 29 Cal.4th at p. 78.)

A cross-complaint may be subject to an anti-SLAPP motion. (§ 425.16, subd. (h).) However, a cross-complaint is not a SLAPP merely because it was filed in response to a complaint. Indeed, under the compulsory cross-claim rule, a defendant must raise by cross-complaint claims against plaintiff that are related to the complaint; the defendant is barred by res judicata and collateral estoppel from raising in a later lawsuit claims or issues that could have been litigated by counterclaim. The rule avoids piecemeal litigation and conflicting judgments. (§ 426.30, subd. (a); *Clark v. Leshner* (1956) 46 Cal.2d 874, 881-882, 299 P.2d 865; *Chao Fu, Inc. v. Chen* (2012) 206 Cal.App.4th 48, 55-56, 141 Cal. Rptr. 3d 381.)

A compulsory cross-complaint related to the claims asserted in the complaint is "rarely, if ever," subject to an anti-SLAPP motion. (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 651, 49 Cal. Rptr. 2d 620, disapproved on other grounds in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5.) A related cause of action is one that "arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause of action [that] plaintiff alleges in his complaint." (§ 426.10, subd. (c).) A "logical relationship" between the claims made in the complaint and the defendant's counterclaims is required, not an absolute identity of facts. (*Currie Medical Specialties, Inc. v. Bowen* (1982) 136 Cal.App.3d 774, 777.) For example, in a breach of contract lawsuit arising from a construction project, an anti-SLAPP motion is unfounded where the defendant files a cross-complaint alleging causes of action relating to the poor work performance of the plaintiff, the plaintiff's fraudulent bidding, billing and work processes, and so on. (*Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 925-932, ["the anti-SLAPP statute often will not apply to cross-complaints"].) By contrast, a cross-complaint may be dismissed as a SLAPP if it "is not 'related' to the transaction or occurrence which is the subject of the plaintiff's complaint, but arises out of the litigation process itself [Citation]." (*Raining Data Corp. v. Barrenechea* (2009) 175 Cal.App.4th 1363, 1373-1374.)

The XD's have not met their initial burden of demonstrating that the challenged causes of action arises from protected activity. This court cannot conclude that the cross-complaint is unrelated to "the transaction or occurrence which is the subject of the plaintiff's complaint..." (*Raining Data Corp. v. Barrenechea, supra*, 175 Cal.App.4th at pp. 1373-1374.) There is a logical relationship between the complaint and the defendant's counterclaims. (*Currie Medical Specialties, Inc. v. Bowen, supra*, 136 Cal.App.3d at p. 777.) "[T]he anti-SLAPP statute's express requirements does not leave litigants confronting, meritless, retaliatory countersuits without a remedy." (*City of Cotati v. Cashman, supra*, 29 Cal.4th at p. 78, fn. 4.) "If a cross-defendant believes that a cross-complaint has been filed 'for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation,' or that the claims against it are frivolous or lacking in evidentiary support, then it may move for sanctions, including attorney fees and other expenses, to be awarded in the trial court's discretion. (See § 128.7, subds. (b)-(d).) The anti-SLAPP statute, however, is not the appropriate remedy." (*Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 934, 116 Cal. Rptr. 2d 187, quoted in *City of Cotati v. Cashman, supra*, 29 Cal.4th at p. 78, fn. 4.)